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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 LIGHTHOUSE RESOURCES INC., et al.,

CASE NO. 3:18-cv-05005-RJB

11 Plaintiffs,

12 and

13 BNSF RAILWAY COMPANY

14 Intervenor-Plaintiff,

ORDER STAYING CASE

15 v.

16 JAY INSLEE, et al.,

17 Defendants,

18 and

19 WASHINGTON ENVIRONMENTAL
COUNCIL, et al.,

20 Intervenor-Defendants.

21 This matter comes before the Court on the parties' various motions (Dkt. 211, 212, 227,
22 and 230, and 232). The Court has considered pleadings filed regarding the motions, oral
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1 argument on March 26, 2019, additional briefing requested on issue preclusion and *Pullman*
2 abstention, and the remaining record.

3 The Court is concerned over pre-judging issues in this case, and the fact that it sees the
4 case very differently than the parties because of issue preclusion discussed below. Time
5 considerations are also a concern; trial is scheduled for May 13, 2019. Also, the Court is well
6 aware of its duty to timely resolve disputes that are properly before it.

7 The Court has spent a good deal of time and effort considering and researching the issues.
8 This is how it looks to the Court at this time:

9 Issue Preclusion

10 In order to prevail on their commerce clause claims, the Plaintiffs and Intervenor-
11 Plaintiff¹ assert that they must show:

12 (1) [W]hether the Defendants intended to or in fact discriminated against foreign
13 or interstate commerce; (2) whether the Defendants intended to or in fact
14 burdened foreign or interstate commerce; (3) the extent of any such burdens or the
15 countervailing actual or alleged benefits of the state's actions; and (4) whether the
16 Defendants intruded into an area in which the United States, and not the states, are
17 permitted to act under the U.S. Constitution.

18 Dkt. 314, at 16. None of these claims were definitively decided in the State Pollution Control
19 Hearings Board proceeding.

20 In regard to the evidence available at a trial on commerce clause issues only, the
21 relevance of the State Pollution Control Hearings Board's decisions as an issue preclusion
22 question, not a claim preclusion question, becomes apparent.

23 The April 1, 2019 order (Dkt. 309) provides the standard on issue preclusion, but it bears
24 repeating here. Under the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts give "the

¹ References herein to Plaintiff includes the Intervenor-Plaintiff.

1 same preclusive effect to a state-court judgment as another court of that state would give.” The
2 federal common law rules of preclusion apply to “state administrative adjudications of legal as
3 well as factual issues, even if unreviewed, so long as the state proceeding satisfies the
4 requirements of fairness outlined in *United States v. Utah Construction & Mining*, 384 U.S. 394,
5 422 (1966).” *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032-1033 (9th Cir. 1994). The
6 *Utah Construction* test requires: (1) that the administrative agency act in a judicial capacity, (2)
7 that the agency resolve disputed issues of fact and law properly before it, and (3) that the parties
8 have an adequate opportunity to litigate. *Id.*, at 1033. Washington courts also recognize that
9 decisions of administrative bodies may have preclusive effect. *Reninger v. Dept. of Corrections*,
10 134 Wash.2d 437, 449 (1998). The Washington test, like the *Utah Construction* test, considers
11 whether the administrative body was acting within its jurisdiction when it made factual and legal
12 determinations, it examines procedural differences between Washington courts and the
13 administrative body, and adds policy considerations. *Id.*

14 As stated in the April 1, 2019, order (Dkt. 309), the test under both *Utah Construction*
15 and Washington law are met. That reasoning is adopted here. The findings and decisions of the
16 Pollution Control Hearings Board affirming Defendant Bellon’s denial of the § 401 permit is
17 entitled to preclusive effect.

18 Analysis of the same issue through the rules of collateral estoppel under Washington law
19 is also appropriate. “Under collateral estoppel, once a court has decided an issue of fact or law
20 necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a
21 different cause of action involving a party to the first case.” *Hydranautics v. FilmTec Corp.*, 204
22 F.3d 880, 885 (9th Cir. 2000). Washington courts apply collateral estoppel to “(1) identical
23 issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must
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1 have been a party to or in privity with a party to the prior adjudication; and (4) application of the
2 doctrine must not work an injustice on the party against whom the doctrine is to be applied.”

3 *Sprague v. Spokane Valley Fire Dep't*, 189 Wn.2d 858, 899 (2018).

4 The Pollution Control Hearings Board’s decisions affirming Defendant Bellon’s denial of
5 the § 401 permit is also entitled to preclusive effect under the doctrine of collateral estoppel. The
6 issues are identical – the commerce clause constitutional claims raised here involve the propriety
7 of the grounds for Bellon’s denial on some of the same issues the board reviewed. The decision
8 was a final judgment on the merits and Lighthouse and BNSF were parties or in privity with
9 parties.

10 Further, as to the fourth element, the “injustice element,” it “is rooted in procedural
11 unfairness. Washington courts look to whether the parties to the earlier proceeding received a
12 full and fair hearing on the issue in question.” *Schibel v. Eymann*, 189 Wn.2d 93, 102 (2017).
13 There is no showing that the proceeding before the board was anything but full and fair.

14 Accordingly, attacks on the Final Environmental Impact Statement would not be allowed
15 at trial. Issues decided by the State Pollution Control Hearings Board would be precluded. For
16 example, there can be no challenges to the State Pollution Control Hearings Board’s decisions on
17 issues 3, 4, 5, 6, 7, 9, and 10, which are listed in the decision. This Court is not an appeal court
18 for the State Pollution Control Hearings Board.

19 The key question in this case, starting with the rulings of the State Pollution Control
20 Hearings Board, is whether the commerce clause was violated. What would be left for trial? If it
21 is commerce clause issues only, there would be no attacks on, for example, the Pollution Control
22 Hearings Board’s finding that the Department of Ecology’s denial of the §401 certificate was not
23 arbitrary, capricious, or contrary to law (except, perhaps, contrary to the commerce clause), that
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1 it was proper to include SEPA considerations in the §401 denial, and to include the words “with
2 prejudice” in the denial. It is likely that the trial, as things stand now, would be marked by
3 continued, and sharp, disagreements on admissibility of evidence with near constant comparisons
4 of the State Pollution Control Hearings Board Order on summary judgment with proposed
5 evidence.

6 An example can be seen at Page 32, lines 10 through 20, of Plaintiff Lighthouse
7 Resources, et al., and Plaintiff-Intervenor BNSF’s Combined Opposition to Defendants’ and
8 Defendant-Intervenor’s Motions for Summary Judgment (Dkt. 262):

9 **1. The evidence of Defendants’ anti-coal bias precludes summary judgment on**
10 **discriminatory purpose.**

11 To begin with, the unfair and unprecedented nature of Defendants’ actions
12 towards the Terminal demonstrates that they discriminated in purpose against the specific
13 type of interstate commerce—coal—that Lighthouse and BNSF intend to bring through
14 the Terminal. For Ecology’s entire existence, the agency had never used substantive
15 SEPA to deny a permit or certification, denied a Section 401 water quality certification
16 with prejudice, or used *any* of the reasons listed in the 401 Denial to deny a water quality
17 certification. *See supra* at 13. After making this unprecedented, “death penalty” decision,
18 Defendants doubled-down and, in another unprecedented move, informed Lighthouse
19 that they would no longer process any of its permit applications. Dkt. 1-4; Ecology
20 30(b)(6) Dep. 128:19-129:23 (Robisch Decl., Ex. 44).

21 All of the evidence listed in the preceding paragraph has, arguably, been approved by the
22 Pollution Control Hearings Board. What, if any, of the proposed evidence would be admissible,
23 and for what purpose?

24 Relief Available

It is also apparent that the Court can not give the Plaintiffs and Intervenor-Plaintiff the
broad relief that they request. This Court can’t overlook, or void, all state environmental laws or
decisions. Any relief would likely be narrowly drawn.

Abstention

Where does abstention fit into this? The Order on Motion for Summary Judgment of the State Pollution Control Hearings Board (Dkt. 130-6) is on appeal to the Superior Court of the State of Washington; a motion requesting that the State Court of Appeals take direct review is pending; the Washington State Supreme Court may also review the actions of the lower courts. A different result may occur at each level. At the time of any federal trial, the federal court will be bound, by issue preclusion, to the most current decisions of the State Pollution Control Hearings Board or of state courts.

If the Court abstains and stays the case in order to allow the state courts to act – (1) the parties may not be bound by the State Pollution Control Hearings Board’s ruling; (2) Plaintiffs may secure relief from state courts that enables them to process their permits; (3) Plaintiffs may secure relief from the state courts which is far more reaching than could be afforded here; (4) if the Plaintiffs lose in the state courts, they would still have an opportunity to proceed with commerce clause issues in federal court with state court findings of fact and conclusions of law as a beginning point, rather than those of the State Pollution Control Hearings Board.

The law regarding *Pullman* abstention was also in the prior order, but will be repeated here for ease of reference. “The *Pullman* abstention doctrine is a narrow exception to the district court’s duty to decide cases properly before it. *Pullman* allows postponement of the exercise of federal jurisdiction when a federal constitutional issue might be mooted or presented in a different posture by a state court determination of pertinent state law.” *Columbia Basin Apartment Ass’n v. City of Pasco*, 268 F.3d 791, 801 (9th Cir. 2001)(*internal quotation marks omitted*). “*Pullman* holds that ‘federal courts should abstain from decisions when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional

1 question can be decided.” *Id.* (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236
2 (1984)). “By abstaining in such cases, federal courts avoid both unnecessary adjudication of
3 federal questions and needless friction with state policies.” *Id.*, at 801-802. “Retention of
4 jurisdiction, and not dismissal of the action, is the proper course” under *Pullman*. *Id.*, at 802.

5 In order to determine whether *Pullman* abstention is appropriate, courts in the Ninth
6 Circuit use a three-part test:

7 (1) The complaint touches a sensitive area of social policy upon which the federal
8 courts ought not to enter unless no alternative to its adjudication is open;

9 (2) such constitutional adjudication plainly can be avoided if a definitive ruling on
10 the state issue would terminate the controversy; and

11 (3) the possibly determinative issue of state law is doubtful.

12 *C–Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir.1983) (*internal quotation marks*
13 *omitted*).

14 This case meets all three elements of the test. The Complaint touches on a sensitive area
15 of social policy upon which this Court should not enter – a viable alternative is offered in the
16 state courts. Further, a determination of whether the commerce clause was violated can be
17 “plainly” avoided, depending on the degree to which Plaintiffs may prevail in the state courts. If
18 the §401 denial is vacated, Plaintiffs could simply cease this litigation and proceed with efforts to
19 satisfy environmental concerns. At least, the federal Constitutional questions “might be mooted
20 or presented in a different posture by a state court determination of pertinent state law” (or facts).
21 *Rollsman v City of Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984). Many of the state issues
22 being raised, including whether the State has the authority to deny a permit with prejudice and
23 whether the denial can be based on considerations other than water quality, are issues of first
24 impression. The determination of the issues of state law are in doubt.

1 Moreover, in addition to the principles of comity raised by *Pullman*, considerations of
2 judicial economy and the likelihood of inconsistent results favor temporary abstention. If this
3 Court properly credits the State Pollution Control Hearings Board's decisions, holds a trial, and
4 the State prevails in this Court, the state courts may later find that the State Pollution Control
5 Hearings Board decision was in error, and remand the case for further consideration of the
6 application. All the effort here would have been wasted – there would have been no need for this
7 Court to consider a constitutional issue in trying to decide if the decision denying the permit
8 should be vacated. Further, the state courts may be bound by findings of this Court in some
9 manner. This may preclude a state court from finding that the State Pollution Control Hearings
10 Board's decision was in error. Additionally, this Court may find that the State did not act
11 improperly, but the state courts may come to a different conclusion, perhaps as it relates to the
12 constitutional claims (due process and equal protection) that are currently pending in the state
13 courts.

14 Accordingly, in consideration of all the above, this case **IS STAYED** pursuant to
15 *Pullman* until after the state court proceedings are concluded. Within 30 days of the conclusion
16 of the state court proceedings, the parties **SHALL FILE** a status report, informing the Court
17 what, if anything, remains.

18 Further, the pending motions for summary judgment (Dkts. 211, 212, and 227 (filed in
19 unredacted form at 224)) and the motions to exclude (Dkts. 230 and 232) **ARE STRICKEN**, to
20 be renoted, if appropriate after conclusion of the state court proceedings. Further, any other
21 motions and deadlines **ARE ALSO STRICKEN**.

22 **IT IS SO ORDERED.**
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1 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
2 to any party appearing *pro se* at said party's last known address.

3 Dated this 11th day of April, 2019.

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6 ROBERT J. BRYAN
7 United States District Judge
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